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SUPREME COURT OF THE UNITED STATES.

October Term, 1940.

No. 990.

THE UNITED STATES,

Petitioner,

v.

NUNNALLY INVESTMENT COMPANY.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The opinion of the court below (R. 31-45) is reported in 36 F. Supp. 332.

QUESTION PRESENTED.

Where a taxpayer has recovered judgment against a collector of internal revenue for an overpayment of income and profits taxes and later brings suit in the Court of Claims for a further refund of tax for the same year on a new ground, which is determined to be meritorious, is the Court precluded from rendering judgment against the United States by reason of the former suit and judgment against the collector?

STATEMENT.

The special findings of fact by the Court of Claims are summarized at some length in the petition. Briefly stated, the material facts are these: Respondent had brought suit in a district court against a Collector of Internal Revenue for an overpayment of income tax for 1920 and recovered a judgment which was paid by the United States. Thereafter respondent filed a claim for a further refund of 1920 taxes on a ground not previously raised and, on rejection of the claim, brought suit against the United States in the Court of Claims. That Court held the new claim meritorious and rendered judgment for respondent, over the Government's contention that the previous suit and judgment against the collector were a bar to the proceeding against the United States.

In the petition here the Government does not question the lower court's holding on the merits. Nowhere in the petition is there any denial that the Government had collected from respondent and is retaining excessive taxes in the amount of the judgment. The petition attacks the decision below solely on the technical ground that judgment against the United States was precluded by the previous judgment against a Collector of Internal Revenue.

In stating the reasons why the writ should be granted, the petitioner thus summarizes its contentions (Pet. p. 11):

> "In view of the probable conflict in principle with the *Moore Ice Cream Co.* decision and in view of the uncertainty as to the present scope of the *Sage* decision, it is highly important to the orderly conduct of the Government's tax litigation that the question be authoritatively settled by this Court."

We shall discuss *first*, the claim that the scope of the *Sage* decision is uncertain, and *second*, the claim of probable conflict with the *Moore Ice Cream Co.* decision, referring in appropriate places in the discussion to subsidiary contentions of petitioner.

ARGUMENT.

I. No Question as to the Scope of the Sage Case Is Presented.

There is no uncertainty as to the scope of the *Sage* decision. In that case, it appeared that a taxpayer had obtained a partial recovery of tax in an action against a Collector of Internal Revenue, and later brought suit against the United States in the Court of Claims for the balance of the tax collection. This Court sustained a recovery in the second suit, holding in an opinion by Mr. Justice Holmes that the first suit was against the Collector personally, and that therefore the judgment therein was not res judicata in the later suit against the United States. Such also was the precise holding of the Court of Claims, which the Government is attacking in the present case. There can be no doubt whatever as to the applicability of the *Sage* case in the present situation.

If there were room for question as to the scope of the *Sage* decision or as to any of the implications which have been drawn from the *Sage* case, in other and distinguishable situations, the present case would furnish no occasion for a consideration of such implications. Since the *Sage* case and the case at bar present *identical situations*, this Court would have no opportunity here to limit or define the scope of the *Sage* case. This ground of certiorari, therefore, is clearly untenable.

As a matter of fact, in connection with the procedural aspects of suits against Collectors, the principle of the *Sage* case has never been questioned in this court by the solicitor general, and the reaffirmances by this Court of the procedural principles of the case have resulted principally from the Government's—not the taxpayer's—reliance upon it.

In *Smietanka v. Indiana Steel Co.*, 257 U. S. 1, the Court,

again speaking through Mr. Justice Holmes, refused to permit a suit for recovery of taxes against the successor in office of the Collector to whom they were paid. The Solicitor General had relied upon the *Sage* case for the proposition that the suit against the Collector is "personal," and on the authority of that case the Court sustained his contention. Cf. *Union Trust Co. v. Wardell*, 258 U. S. 537.

The Solicitor General next relied upon the *Sage* case in *Bankers Coal Co. v. Burnet*, 287 U. S. 308, for the proposition that a particular issue tried out for an earlier year in a suit against a Collector is not *res judicata* in a later year in a suit against the Commissioner. The Court sustained his contention, holding the *Sage* case applicable.[1] The *Bankers Coal Co.* case represents a full affirmation of the doctrine of the *Sage* case.

Also in the case of *Tait v. Western Maryland Ry. Co.*, 289 U. S. 620, it was the Solicitor General who relied on the *Sage* case in attempting to prevent the application of *res judicata*. In that case the Court fully recognized the authority of the *Sage* case, but held it inapplicable where the first suit was against the Commissioner or the United States and the second suit was against the Collector.

A factual situation similar to that existing in *Tait v. Western Maryland Ry. Co.* was presented in the case of

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[1] There are two branches of the doctrine of *res judicata*, as the Government suggests in footnote 2 on page 10 of its petition; but this affords no basis whatever for the attempted distinction of the *Bankers Coal Co.* case from the *Sage* case and the decision below. The Court did not suggest, in the *Bankers Coal Co.* case, that the earlier decision on the identical issue was inapplicable because it related to a different taxable year. On the contrary, relying squarely on the *Sage* case, the Court rested its decision on the ground that the United States is not a party to a suit against a Collector. Both branches of the rule of *res judicata* are exactly the same so far as the requirements of party identity is concerned. If the United States had been a party to each of the suits in the *Bankers Coal Co.* case, there is no doubt that *res judicata* would have applied.

Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381. The Court recognized the same distinction between that case and the *Sage* case which had already been pointed out in *Tait v. Western Maryland Ry. Co.* The *Sunshine Anthracite* case added nothing of importance here to *Tait v. Western Maryland Ry. Co.,* and it expressly affirmed the principle of the *Sage* case.[2] The petitioner's suggestion, therefore, that there is any conflict between the case at bar and the *Sunshine Anthracite* case is entirely without merit.

Even in cases where the Government has sought to avoid the *constitutional,* as distinguished from the *merely procedural,* implications of the *Sage* case, and has contended that retroactive restrictions on refund actions were justified on the basis of sovereign immunity to suit, even in the case of suits against Collectors, it has admitted the scope and authority of the decision in the *Sage* case and related cases in relation to procedure and *res judicata.* See, for example, the briefs in: *Graham v. Goodcell,* 282 U. S. 409, and *Anniston Mfg. Co. v. Davis,* 301 U. S. 337.[3]

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[2] Mr. Justice Douglas made the following statement in this connection (p. 403):

> "Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (Sage v. United States, 250 U. S. 33; Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308) are not in point, since the suit against the Collector is 'personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different.' Sage v. United States, supra."

[3] In the brief for respondent in *Graham v. Goodcell,* No. 36, Oct. Term, 1930, the Solicitor General said (p. 34):

> "Nor does the fact that the instant case involves a suit against the collector of internal revenue rather than against the United States lead to a different conclusion. Actions against a collector are personal in the sense that they may not be prosecuted against his successor in office and judgments therein are not *res judicata* in suits against the United States. *Smietanka*

It is absurd to suggest that the holding of the Court in the *Sage* case as to the "personal" character of a suit against a Collector was mere *dictum.*[4] That principle

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v. Indiana Steel Co., 257 U. S. 1; *Sage v. United States*, 250 U. S. 33."

The Solicitor General, in the brief for the respondent in *Anniston Mfg. Co. v. Davis*, No. 667, Oct. Term, 1936, stated (pp. 40-41):

> "Petitioner, in his attempt in effect to secure reversal of this line of authority, relies on several decisions of this Court which emphasize that the action against the Collector has the procedural consequences of a suit against an individual rather than one against the Government. *We do not, of course, question the soundness of these decisions; if Congress chooses to extend a remedy in the form of a personal action, it must be taken to have intended that the ordinary procedural incidents of such an action would be operative.* Thus, in *Patten v. Brady*, 184 U. S. 608, 612-615, this Court held that after the death of the Collector the suit could be revived against his executrix. Correlatively, it held in *Smietanka v. Indiana Steel Co.*, 257 U. S. 1 (followed in *Union Trust Co. v. Wardell*, 258 U. S. 537, 542), that the action could not be brought against the Collector's successor in office. In *Sage v. United States*, 250 U. S. 33, 37, a judgment against the Collector was held to be no bar to suit against the United States for recovery of the balance of the taxes overpaid. In *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308, 312, it was held that a judgment against the Collector was not *res judicata* against the United States." (Emphasis supplied.)

[4] Petitioner does not assume responsibility for the *dictum* charge, but simply points out in footnote 1 on page 8 of its petition that the discussion of the personal nature of the action in the *Sage* case "has been *regarded* as *dictum*" by two District Judges and a law review writer. None of them attempts any open analysis or study of the case. The law review writer blindly accepts the *dictum* charge from one of the District Judges, and both Judges rely on the following language used by Mr. Justice Holmes in the *Sage* case:

> "But *perhaps* it would be enough to say that if the judgment otherwise were a bar, the bar would be removed by the subsequent enactment of the Act of July 27, 1912, Chap. 256, 37 Stat. at L. 240, upon which, as well as the Act of 1902, this claim is based." (Emphasis supplied.)

They all entirely ignore the use of the word *"perhaps,"* and ignore the fact that this statement was made only *after* a thorough analysis of the nature and incidents of suits against Collectors *and after* the decision is rested unequivocally on the ground that *res adjudicata* does not apply on account of the difference in parties.

was the basis of the decision in the *Sage* case and has always been so regarded by this Court, and by the Solicitor General as well.

On page 11 of the petition it is contended that, even though some suits against Collectors may be "personal," the action here was not, because here the Collector acted under an assessment by the Commissioner. There is nothing new in this situation. The same circumstance existed with respect to the tax involved in the *Bankers Coal Co.* case, as was evident from the record.[5] This fact, therefore, affords no basis whatever for distinguishing the present case from the *Sage* and *Bankers Coal Co.* cases.

On page 12 of the petition it is urged that the decision below is in conflict with the "well-established principle that a single cause of action may not be split." It is submitted, however, that the principle relied on can apply only where the parties are the same in both suits. The rule against splitting a cause of action is but a part of the doctrine of *res judicata.* Where the parties are different, as was the case here, the rule against splitting causes, or estoppel by judgment, or *res judicata,* does not apply.[6] The *Sage* case itself is clear authority for this position, since the same act of tax collection and the same tax liability was involved in both suits there. *The very same quotation from Stark v. Starr,* 94 U. S. 477, 485, *quoted and relied upon by the Government here, was quoted and relied upon by the Government near the beginning of its brief in the Sage case.*

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[5] See findings of Board of Tax Appeals, 18 B. T. A. 901, 907. If the same fact was not present in the *Sage* case, certainly no point was made of its absence.

[6] See Clark, Code Pleading (1928), pp. 318-324. In all of the cases on splitting of causes of action cited by petitioner, the parties to the two suits were identical, except in the case of *American Woolen Co. v. United States,* 18 F. Supp. 783 (C. Cls.), where the first suit was against the Commissioner of Internal Revenue *in his official capacity,* and, of course, barred a subsequent suit against the United States on ordinary principles of *res judicata.*

When the taxpayer in the *Bankers Coal Co.* case, supra, attempted to reargue again the proposition which the Government had argued unsuccessfully in the *Sage* case—that the United States, for purposes of *res judicata,* should be treated as privy to the judgment in the suit against the Collector—the Solicitor General thus summarily disposed of his contention:

> "We believe that the petitioners' argument that the Commissioner is privy to the suit against the collector is fully answered by what this Court said in the *Sage case, supra,* which the court below accepted as controlling upon this question."[7]

The same answer should be made to the Government's effort now to have this Court reconsider anew principles which were again reaffirmed in the *Bankers Coal Co.* case, and which have never been questioned in any subsequent decision of this Court.

II. The Holding in the Sage Case and in the Case at Bar in No Way Conflicts With the Decision in the George Moore Ice Cream Co. Case.

The *Moore Ice Cream Co.* case did not mention the *Sage* case nor purport to disturb the holding of that case, and it cannot be construed to have that effect.

The mere propinquity in time of the decision in the *Moore Ice Cream Co.* case (decided on May 8, 1933) to the decisions in the cases of *Bankers Coal Co. v. Burnet,* 287 U. S. 308 (decided on December 5, 1932), and *Tait v. Western Maryland Ry. Co.,* 289 U. S. 620 (decided on May 29, 1933, and argued in the very week when the *Moore Ice Cream Co.* case was decided), should be sufficient to dispel any idea that the *Moore Ice Cream Co.* case was intended to decide anything inconsistent with the *Sage* case and the

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[7] *Bankers Coal Co. v. Burnet,* No. 104, Oct. Term, 1932, respondent's brief, p. 20.

Bankers Coal Co. case, which expressly reaffirms and follows the *Sage* case. All of these decisions were by a unanimous court; and the *Moore* case involved no question of *res judicata,* while the other two cases definitely involved that principle.

Mr. Justice Stone, in the *Bankers Coal Co.* case, relying upon and affirming the holding of the *Sage* case that a judgment against a Collector is not *res adjudicata* in a suit against the United States, said (p. 311):

> "With respect to this contention (the assertion by the *taxpayer* of res judicata) it is sufficient to say that the suit in the District Court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not res judicata against the Commissioner or the United States (*Graham and Foster v. Goodcell,* 282 U. S. 409, 430; *Sage v. United States,* 250 U. S. 33; see *Smietanka v. Indiana Steel Co.,* 257 U. S. 1; compare *Union Trust Co. v. Wardell,* 258 U. S. 537)."

Mr. Justice Roberts, in *Tait v. Western Maryland Ry. Co.,* while distinguishing that case from the *Sage* case on the ground that in that case the former suit was against the Commissioner and the second suit was against the Collector, expressly recognized the holding and authority of the *Sage* and the *Bankers Pocahontas Coal* cases where the former suit is against the Collector and the second suit against the Commissioner or the United States, stating (p. 627):

> "In a suit for unlawful exaction the liability of a collector is not official but personal. *Sage v. United States,* 250 U. S. 33; *Smietanka v. Indiana Steel Co.,* 257 U. S. 1; *Graham and Foster v. Goodcell,* 282 U. S. 409, 430. And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States. *Bankers Pocahontas Coal Co. v. Burnet,* 287 U. S. 308, 311 * * *."

In view of the foregoing, the Government's suggestion that the Court intended, by the *George Moore Ice Cream Co.* decision, to abandon in any respect the ground of its decision in the *Sage* case, expressly followed in the *Bankers Coal Co.* case and approved in *Tait v. Western Maryland Ry. Co.*, would seem to attribute to the Court a dismal lack of understanding of the significance of its holdings.

The decision in the *Moore Ice Cream Co.* case is, of course, in no way inconsistent with the *Sage* case or *Bankers Coal Co.* case. Those cases involved questions of *res judicata*, while the *Moore Ice Cream Co.* case involved a question of the power of Congress under the Constitution—the question whether the statute abolishing the technical requirement of protest deprived the Collector of property without due process of law if applied in a suit against a Collector to recover taxes collected before the statute was enacted. The Court reached the conclusion that there was no practical danger that thus to apply the statute would work any hardship on the Collector, since from a practical standpoint he was certain of reimbursement from the Government, and that therefore the removal retroactively of the technical requirement of protest did not deprive him of property without due process of law. As the Court said, he was just as certain to be compensated as a person whose land the Government seizes is certain ultimately to be compensated for it. There was, therefore, no practical danger of injury. That is all that was necessary to uphold the constitutionality of the statute.

In reaching the decision which the Court reached, Mr. Justice Cardozo used language—such as that quoted in the petition, pp. 9-10—about the character of suits against collectors, which standing alone might tend to indicate that a suit against the collector and a suit against the United States are one and the same thing. But certainly, in the light of the entirely different question there involved, such

language does not require that we assume that the Court intended to abandon doctrines so recently affirmed.

Surely neither Mr. Justice Stone nor Mr. Justice Roberts, who wrote the opinions in the *Bankers Coal Co.* case and *Tait v. Western Maryland Ry. Co.*—the former decided a few months before and the latter three weeks after the decision of this Court in the *Moore Ice Cream Co.* case—would have concurred in the decision in the *Moore Ice Cream Co.* case if they had interpreted it as conflicting with their decisions; nor would Mr. Justice Cardozo have concurred in their decisions had he considered that such a conflict existed.

Nor could the Chief Justice's concurrence in the *Moore Ice Cream Co.* case be explained if the petitioner's interpretation of the decision were accepted; since the Chief Justice just two terms earlier had written the opinion of the unanimous court in the case of *Graham v. Goodcell*, 282 U. S. 409. It there appeared that Congress had imposed a retroactive restriction on certain refunds. Some taxpayers sued collectors and others sued the United States, asserting that the statute violated the Fifth Amendment. The Solicitor General urged that the statute could be supported as an assertion of sovereign immunity without regard to the due process provisions. Rejecting that contention and relying squarely upon the holding in the *Sage* case that the suit against the Collector is personal, the Chief Justice said (p. 430):

> "The argument of the government in this respect (that is, the claim of sovereign immunity to suit) is not adequate to dispose of the controversy. Some of the present suits were brought against the *collector individually* and were based upon *the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States.* Sage v. United States, 250 U. S. 33, 37; Smietanka v.

> Indiana Steel Co., 257 U. S. 1, 4, 5. If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers *all* remedy *both* as against the United States and also as against the one who committed the wrong." (Emphasis supplied.)[8]

The last case in which this Court was called on to consider the constitutional implications of the *Sage* case was *Anniston Mfg. Co. v. Davis*, relied on in the petition here (p. 10). In that case the Circuit Court of Appeals, relying on an erroneous interpretation of the *Moore Ice Cream Co.* case, had held that the suit against the Collector could be disposed of on principles of sovereign immunity since the suit against the Collector was just a means of bringing the Government into court. This Court rejected that contention and sustained the statute in question only on the ground that the statute substituted a fair and adequate remedy against the Government, which met the requirement of due process of law. The Court said:

> "The judgment of dismissal is affirmed, *but* upon the grounds stated in this opinion." (Emphasis supplied.)

It seems quite unreasonable, therefore, for the petitioner to suggest that the Anniston case furnishes any support whatever for his contention that the *Moore Ice Cream Co.* case in any way reflects upon the decision in the *Sage* case.

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[8] During the oral argument in *Graham v. Goodcell*, the Assistant Attorney General argued that Congress could invoke the doctrine of sovereign immunity to bar a suit against a Collector just as if it were a suit against the United States. Mr. Justice Holmes emphatically replied from the Bench that such an argument was contrary to the fundamental principles on which our Government was founded. It was certainly clear that Mr. Justice Holmes recognized the *Sage* case as standing not only for the procedural rule relied on here, but also for the deeper implications involved in *Graham v. Goodcell*.

The *Graham* and *Anniston* cases clearly demonstrate that there are real differences in substance, as well as procedural differences, between a suit against a Collector and a suit against the United States. The only confusion which has arisen in connection with the subject is in the minds of two authors largely relied upon by the Government in its brief in the court below, and cited here.[9]

III. If Any Change Should Be Made in the Rule of the Sage Case, It Should Be Made by Congress.

For more than twenty years the holding of the *Sage* case that suit against a Collector does not bar a subsequent suit against the United States for taxes not recovered in the first suit has not been questioned even by the Solicitor General—much less by this Court—until the present petition was filed. If the principle there laid down is to be disturbed after more than twenty years of reaffirmation by

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[9] Paul, Studies in Federal Taxation, 2d Series, pp. 124-126, and Griswold, Res Judicata in Federal Tax Cases, 46 Yale L. J. 1320. Both of these authors, disliking the decisions in the *Sage* and the *Bankers Coal Co.* cases and not appreciating the substantial bases of these decisions, grasp at phrases in Mr. Justice Cardozo's opinion in the *Moore Ice Cream Co.* case to support their wishful thinking that this Court has prepared to abandon the *Sage* case and the cases following it. In reaching this erroneous conclusion they completely misunderstand the holding in such cases as *Graham v. Goodcell* and *Anniston Mfg. Co. v. Davis.*

Griswold (op. cit. p. 1342) and Paul (op. cit. p. 126) cited the decision of the Circuit Court of Appeals in the *Anniston* case, 87 F. (2d) 773, as supporting a plea of sovereign immunity in suits against Collectors, and they add to their citation: "affd. 301 U. S. 337"; but they fail to explain that this Court's opinion is utterly inconsistent with any claim of sovereign immunity. Griswold even cites *Graham v. Goodcell* as sustaining the defense of sovereign immunity in a suit against a Collector, whereas the holding in that case is definitely and expressly to the contrary.

The only court decision which lends any support to the contention of petitioner is the decision in *Western Maryland Ry. Co. v. United States*, 23 F. Supp. 554 (D. C. D. Md.), which relies largely upon the erroneous assumptions in Griswold's article.

this Court, it should certainly be by legislation, and not by any effort to have this Court overrule a line of unanimous decisions of such long standing.

There is no question as to the power of Congress, if it wishes to do so, to prevent a suit against the United States where a prior suit has been prosecuted against a Collector. But if Congress should see fit to alter the present situation with reference to the effect of suits against a Collector—where multiple collections by different Collectors may be involved, and where substantial rights may be affected by changes which might appear to have only procedural importance, and where the presently existing right of trial by jury may be threatened—just what changes Congress would adopt are entirely problematical.[10]

For this Court, with only the narrowest section of a large and important field before it, to undertake to disturb well-settled rules from which many and important implications flow, would certainly present dangers and difficulties which no necessities in the present situation require the Court to incur. Since the rule followed by the court below has been settled law for at least twenty-one years, no great hardship or confusion is likely to result from leaving it undisturbed until Congress chooses to act.

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[10] When a related question was presented to Congress in connection with appeals to the Board of Tax Appeals, it adopted what is, in effect, a principle of *election of remedies* rather than the principle of *res judicata*. Section 284 (d) of the Revenue Act of 1926 does *not* provide, as the Government suggests (Petition pp. 13-14), that a *final decision* of the Board of Tax Appeals is required to bar recourse by the taxpayer to other remedies, but clearly provides that whenever a *timely appeal* to the Board of Tax Appeals has been *filed*, all remedies other than the prosecution of that appeal are from that moment forever barred to the taxpayer; and the same statute [Section 273 (f)] eliminates the right of the Commissioner to make additional assessments except in accordance with the decision of the Board.

CONCLUSION.

It is therefore respectfully submitted that the petition should be denied.

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